IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~730~~ 51

ARCHIE WILLIAM HILL, JR.,

Petitioner,

vs.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the California Court of Appeal, Second Appellate District is published in 67 Cal.Rptr. 389. The opinion of the California Supreme Court is reported in 72 Cal.Rptr. 641.

Jurisdiction

The California Court of Appeal, Second District, reversed the conviction of the appellant by their opinion of March 28, 1968. The California Supreme Court granted a hearing on May 22, 1968, and on November 13, 1968, af-

firmed the conviction of the appellant. The jurisdiction of this Court is invoked under 28 U.S. Code Section 1257(3) on the ground that a right guaranteed to the petitioner by the United States Constitution has been infringed by the judgment of the lower Court. The Petition for Certiorari was filed March 7, 1969 and Certiorari was granted October 13, 1969.

Constitutional Provisions Involved

Amendment Four to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fifth Amendment provides, among other things, that no person, "shall be compelled in any criminal case to be a witness against himself."

U.S.C.A. Constitution, Amendments 1 to 5, p. 102

Questions Presented

1. Does the Fourth Amendment state a general principle which requires antecedent justification before a magistrate of every search or seizure of person or property, subject only to judicially-created exceptions of necessity?

2. Is the rule in *Chimel* v. *California* limiting the police power to search a private residence retroactive?

Summary of the Facts

On October 20, 1966, after trial without a jury, the appellant and petitioner was convicted of the crimes of robbery (California Penal Code Section 211) and kidnapping for the purpose of robbery (California Penal Code Section 209).

Four men robbed a residence in Studio City on 4 June 1966. The following day, Alfred Baum and Richard Bader were arrested for possession of narcotics. At the time of their arrest, they were driving in the appellant's car, which contained stolen property from the Studio City robbery. Both men made full statements admitting the commission of the robbery, and both implicated the appellant. Baum and Bader were properly warned of their Dorado rights, but they were not also informed that counsel would be appointed if they were indigent. Their confessions were, therefore, inadmissible as to their guilt. (*Miranda* v. *Arizona,* 384 U.S. 436.) Because the confessions did not violate the appellant's rights, they were admissible on the issue of probable cause for his arrest. (*People* v. *Varnum,* 66 Cal.2d 808, 813.) Bader stated that he was sharing an apartment with the appellant at 9311 Sepulveda Boulevard, and that the guns used and the property taken were there.

On June 6, Officer Gastaldo interviewed Baum and Bader, and they repeated their inculpations of the appellant. From records of the Los Angeles Police Department, Gastaldo verified the appellant's association with Bader, his age and physical description, his residence, and the make of his automobile. This information corresponded with and corroborated the descriptions provided by the

robbery victims and data supplied by Baum and Bader. Gastaldo and three other officers proceeded to the appellant's apartment, and after confirming the correctness of the address, knocked on the door. Gastaldo testified: "The door was opened and a person who fit the description exactly of Archie Hill, as I had received it from both the cards and Baum and Bader, answered the door. . . . We placed him under arrest for robbery."

The arrested man said that his name was Miller, that he did not live in the apartment, and that he was just "sitting around" waiting for the appellant. He stated that he did not know of any stolen property in the apartment, and that he had seen no guns, although an automatic pistol and a clip of ammunition were in plain view. The man produced identification, but Miller's credentials did not "prove anything" to Gastaldo. Miller was subsequently booked, held for a day and a half, and released.

The officers searched the premises and found weapons, stolen property, and two pages of a diary in defendant's handwriting. The diary told a damning story of the robbery of June 4. At trial, eyewitnesses to the robbery were unable to identify the appellant.

Statement of the Facts

On June 4, 1966, at approximately 10:20 P.M., four men, two of whom were wearing masks (all four men were armed, two with guns and two holding knives), knocked lightly on the front door of a residence located at 11935 Laurel Hills in Studio City. (A-10)

Nicholas Georgiade was home with his wife and Mother that evening, and opened the door. One of the four men

told Georgiade that this was a stick-up; Georgiade replied, "You guys must be kidding around." Shortly thereafter, Georgiade was struck on the head with a gun. Georgiade could not identify the petitioner as one of the four men. (A-11)

Four or five dollars was given to one of the four men on demand. Georgiade did not give anyone permission to take his Toshiba radio. (A-12)

Mrs. Georgiade was met at her bedroom door by two men and became frightened and fell back into the bedroom. One of the men advised her to lay down on the floor and to keep quiet. (A-16)

One of the men took Mrs. Georgiade's purse containing her wallet, forty dollars, and card-case. (A-17) Mrs. Georgiade was also unable to identify the petitioner. (A-21)

Mrs. Bertha Georgiade, the mother of Nicholas Georgiade, upon demand, gave one of the men ten dollars. Mrs. Georgiade was also unable to identify the petitioner. (A-27)

Officer Gastaldo was the arresting officer of Baca, one of the defendants in this case. Gastaldo, during the course of the investigations of the robbery by the four men, was informed that an arrest for narcotics had been made and property taken from the residence robbery was recovered. (A-36)

The additional testimony set forth here was limited to probable cause. The car that was driven by Baum and Bader, two co-defendants, belonged to the petitioner. Prior to going to Hill's residence, the officer checked the local field interrogation files and found shake cards which associated Hill and Baum and Bader. (A-38)

On June 6, 1966, at approximately 10:30 P.M. and accompanied by three other officers, they then proceeded to Hill's apartment with the belief that there was additional property from the robbery at Hill's apartment. The officers knocked on the door and a man by the name of Miller opened the door. Immediately, one of the officers recognized that Miller closely fit the description of a suspect. (A-39)

At the same time the officer observed an automatic revolver with a loaded clip, sitting on the coffee table in the front room of the apartment. Sergeant Ide had informed Miller he was under arrest for robbery. One of the officers went into the bedroom and recovered the Starter gun, camera, two knives and the hoods. (A-40)

The officer located two pages of Hill's diary in the drawer of Hill's bedroom. The diary implicated Hill as being a participant in the robbery and was read into evidence over the objections of Hill.

The officers did not have a warrant for the arrest of Hill or for any other occupant at that apartment nor did they have a search warrant. Two of the four officers were armed with shotguns and all were dressed in plain clothes. (A-43) The officers were not given permission to search. (A-46)

The preliminary transcript was submitted to the Court and additional testimony was then offered by the People. Officer Gastaldo testified at the trial, stating he had the following descriptions of the robbers, "It consisted of four male Caucasians in age group from 21 to 26, all ranging in heights from 5'9" to 5'11", the hair on two of them was dark brown in color, the other two were wearing hoods,

had a complete description of the weapons, had a description of a vehicle, which was used, a late model Chevrolet, light in color, '65." (A-53)

Hill was described as a male Caucasian, either 19 or 20, 5'10", 155, brown hair and brown eyes. (A-54) Prior to going into Hill's apartment, Officer Gastaldo checked and found that one of the articles removed from Baum and Bader's card on their arrest under the marijuana charge was actually a piece of property which was taken in the robbery of the residence in Studio City. The officer checked with Baum, Bader, and the victim himself. (A-56)

The officer received a full statement as to what occurred at the various robberies and who was involved. Officer Gastaldo was given the address of Hill again and advised that the guns used in the robbery were there and also that the remaining property should be in his apartment. (A-56)

Officer Gastaldo then modified his earlier testimony at the preliminary hearing by stating, "The door was opened and a person who fit the description exactly of Archie Hill, as I had received it from both the cards and from Baum and Bader, answered the door." (A-57)

The apartment consisted of a living room, kitchen area, one bedroom and a bath. Miller told the officers his name was Miller and that he didn't live there and that he had no knowledge of what was in the apartment. Miller further stated that he didn't know where Hill was, that Hill lived in the apartment and that he was just sitting around waiting for him; that to his knowledge, there was no one else in the apartment but him. (A-59)

Miller showed the officers some type of identification which showed him to be Miller. Exactly what identification the officer couldn't recall. (A-60)

Immediately after the arrest, Miller was pushed aside and the officers made a fast search of the apartment to determine there was nobody hiding. The officers never asked Miller permission to search the apartment. (A-61)

The diary pages with the incriminating information was found in the bedroom drawer after the officers found rent receipts in the name of Hill.

It took the officers approximately six or seven hours to accumulate all the information regarding Hill's involvement before the officers went to Hill's apartment. (A-61)

Miller was six feet tall, or two inches taller than Hill; also Miller was ten pounds heavier than Hill. (A-62)

The officer was shown further identification by Miller. The officer couldn't recall if it was a driver's license and/or a draft card. The officer couldn't recall if Miller's description fit the description he had on his identification. (A-64)

Miller was booked in the name of Miller. (A-65)

Summary of Argument

The Fourth Amendment, construed in the light of judicial history, was intended to require use of a search warrant as a condition to searching a man's home with very few limited strict exceptions.

The petitioner had a personal diary seized by the police in his bedroom drawer when he was not present in his residence. There is a strong inference that the police search

was not conducted in good faith, based on the "mistaken" arrest of a visitor in Hill's apartment.

As an additional basis for reversal, the petitioner contends that the rule set forth in *Chimel* should be given retroactive effect.

For those reasons, the search and the judgment founded thereupon is inconsistent with the Fourth Amendment and should be disapproved.

ARGUMENT

The Petitioner Contends That the Damning Pages of His Diary, Which Resulted in His Conviction, Were Illegally Obtained in Violation of His Constitutional Rights Under the Fourth Amendment of the United States Constitution.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Without the illegally obtained diary pages, the evidence was clearly insufficient to find the petitioner guilty of any crime and, therefore, the conviction of the appellant based upon this incriminating evidence, is extremely prejudicial and should be reversed.

The Fourth Amendment to the United States Constitution, construed in the light of judicial history, with a few exceptions, was intended to require the use of a search warrant issued by a magistrate as a condition to searching a person's home.

Those very few exceptions negating the requirements of the police to first obtain a search warrant before searching a person's home, have been limited by this Court to situations where the officers have antecedently justified their right to arrest and have had additional information which would have justified issuance of a search warrant and which were conditioned upon the police conducting the search reasonably and in good faith.

In this case, there were no exigent circumstances and the only antecedent justification the police had at best, was for the arrest of the petitioner and sufficient information to obtain a search warrant for those items connected with the crime; in particular, the stolen goods and any weapons or evidence used to carry out the crime. However, there was absolutely no justification for the police seizure of the petitioner's personal diary located in the petitioner's bedroom drawer. Especially, when it is taken into account, the police's "mistaken" arrest took place in the petitioner's living room area.

It is the petitioner's strong contention that the search and seizure of the diary that occurred in this case was unconstitutional even prior to this Court's decision in *Chimel* v. *California,* 395 U.S. 752.

The cases of *Harris* v. *United States,* 331 U.S. 145 and *United States* v. *Rabinowitz,* 339 U.S. 56, which the California Supreme Court has interpreted as giving the police

almost unlimited rights to search incident to a lawful arrest are clearly distinguishable from the instant case.

As the majority opinion in *Rabinowitz* stated, "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches, and regrettably, in our discipline, we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. *Go-Bart Improv-* the facts and circumstances of each case. *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344, 357."

The Court further stated in the *Rabinowitz* opinion that, "Reasonableness is in the first instance for the District Court to determine. We think the District Court's conclusion that here the search and seizure were reasonable should be sustained because: (1) The search and seizure were incident to a valid arrest; (2) The place of the search was a business room to which the public, including the officer was invited; (3) The room was small and under the immediate and complete control of respondent; (4) The search did not extend beyond the room used for unlawful purposes; and, (5) The possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money."

The very first factor that the Court in *Rabinowitz* relied on in determining that the search and seizure in that case was reasonable was that the search and seizure were incident to a "valid" arrest; here even that issue raises some question.

The trial court in this case ruled that the good faith of the four officers in arresting Miller (who was a visitor in

the petitioner's apartment, at a time when the petitioner was not at home), was a sufficient enough arrest to allow the police to conduct a complete search of the apartment incident to the mistaken arrest.

The California Court of Appeal reversed the trial court's decision and relied on *Harris* and *Rabinowitz* to do so. The California Court of Appeal, without any dissent stated, "Aside from inferences arising from the mere presence of Miller in the apartment and based upon the officer's mistaken belief that he was Hill, the record does not show that the apartment was under the immediate control of Miller. The constitutionally protected privacy at stake was that of Hill who was absent from his place of residence. While the doctrine of probable cause assures a balance between the rights of the individual and those of the government with respect to the matter of arrest, the constitutional protection against unreasonable searches, particularly of a person's home, would be less than complete if a plenary search could be justified as incident to an arrest of a person mistakenly believed by an officer to be in immediate charge of the premises. Such a case is not one where the right of privacy must reasonably yield to the right of search."

The California Court of Appeal in reversing Hill's conviction was very cognizant of the fact that separate personal interests are involved between an arrest and a subsequent search; the fact that you give up one, based on reasonable cause, does not mean necessarily that you have given up the other.

As Mr. Justice Frankfurter, quoting Judge Learned Hand, stated in the dissent in *Rabinowitz,* "It is true that

when one has been arrested in his home or his office, his privacy has already been invaded; but that interest, though lost, is altogether separate from the interest in protecting his papers from indiscriminate rummage, even though both are customarily grouped together as parts of the right of privacy. The history of the two privileges is altogether different; the Fourth Amendment distinguishes between them; and in statutes they have always been treated as depending upon separate conditions." 176 F.2d 732.

The California Supreme Court by its opinion affirming the conviction of Hill, uses the logic that the mistaken arrest, since it was made in good faith, authorizes the officers to make a complete and thorough search of Hill's private residence even though he was absent.

The petitioner strongly contends these additional exceptions to the Fourth Amendment expressed by the California Supreme Court, would have diluted the protections afforded by this Amendment to the breakdown point. This is a far cry from what the Court stated in *Robertson* v. *Baldwin,* 165 U.S. 275, "the right to search incident to arrest, is merely one of those very narrow exceptions to the guarantees and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case."

Certainly the Court in *People* v. *Chimel, supra,* have put the search incident to a lawful arrest back to the perspective that the majority of past high Court decisions have espoused; that is, to protect private citizens from having their homes searched by the police absent a search warrant with just a few strict exceptions predicated on necessity.

The good faith of the four officers is highly debatable in this case. Mr. Miller at no time represented that it was his apartment, Miller even stating he was waiting for Hill; Miller was never asked permission to search the residence by the officers, which is a normal police practice prior to a search of a home, even when the search is incident to a lawful arrest, Miller told the officers he was Miller and showed the officers identification showing that he, in fact, was Miller; Miller is at least two inches taller than Hill and ten pounds heavier, and Miller was arrested and booked under the name of Miller.

It does not seem reasonable that a private person's residence which is normally protected by the Fourth Amendment against search and seizure is left wide open to officers because of their mistaken subjective good faith. Contrary to what the California Supreme Court stated in their opinion that *Beck* v. *Ohio,* 379 U.S. 89, 97, is not germane, the petitioner contends the manner in which the California Court of Appeal used this notation is extremely relevant for the general proposition it espouses, that is, "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects, only in the discretion of the police."

An analogy can easily be drawn between *Chimel* and the case at bar. In *Chimel,* the Court, while not necessarily agreeing that the strategy of maneuvering the arrest of Chimel in his home was utilized, agreed this possibility exists, since this as a practical matter would give law enforcement officials the opportunity to engage in searches not justified by probable cause. The officers knew in this case that if they didn't make an arrest, then they couldn't search the petitioner's residence.

By arresting Miller, the officers then felt they had a license to completely search the petitioner's residence in his absence. As the Court stated very appropriately in *Boyd* v. *United States,* 116 U.S. 616, "Illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of Courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon."

As this Court stated subsequently in *McDonald* v. *United States,* 335 U.S. 451, "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.

"The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a

search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

These are some of the background cases that illustrate the importance of the Fourth Amendment. Beside the questionable arrest of the "petitioner" in this case, there are other substantial deviations from the main factors the majority opinion relied on in *Rabinowitz*. In the instant case the place searched was a private residence and the police were not given any permission to search; in *Rabinowitz*, the place that was searched was a business room that was open to the public and the officers. Also in *Rabinowitz* the room that was searched was small and under the immediate and complete control of the respondent. In the instant case, as detailed earlier by the Court of Appeal in California, Miller did not have apparent control of the premises as evidenced by the record, nor did he have actual control. And unlike *Rabinowitz*, in this case there was no crime being perpetrated at the time the officers made the arrest of Miller.

To belabor the vast factual differences between *Rabinowitz* and the case at bar would seem to argue the obvious. Certainly the majority opinion in *Rabinowitz* left many practical questions as to the limits the police could search. As the dissenting opinion stated, "Is search to be restricted to the room in which the person is arrested but not to another open room into which it leads? Or, take a house or an apartment consisting largely of one big room serving as dining room, living room and bedroom. May search be made in a small room but not in such a large room? If you may search the bedroom part of a large room, why not a bedroom separated from the dining room by a par-

tition? These are not silly hard cases. They put the principle to a test.

"To assume that this exception of a search incidental to arrest permits a free-handed search without warrant, is to subvert the purpose of the Fourth Amendment by making the exception displace the principle. History and the policy which it represents alike admonish against it."

Rabinowitz, out of all of this, has come to stand for the proposition that a warrantless search incident to a lawful arrest may generally extend to the area that is considered to be in the immediate possession or under the control of the person arrested.

When the totality of facts in the instant case are closely examined, it appears extremely difficult to justify the police search and seizure of the petitioner's diary. The police did not have a search warrant when apparently there was ample time to obtain same; the police made the search on the basis of a mistaken arrest while the petitioner was absent; the diary was in a bedroom drawer while the arrest took place in the living room; and the seized diary was not connected with the crime but merely acted as evidentiary matter which the Court in the past has treated in a far more strict manner insofar as deviating from the Fourth Amendment is concerned.

In *Trupiano* v. *United States*, 334 U.S. 699, the Court emphasized the importance of securing and using search warrant wherever reasonably practicable. The Court stated, "This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. To provide the nec-

essary security against unreasonable intrusions upon the private life of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement."

While *Rabinowitz* over-ruled *Trupiano* later with respect to placing less emphasis on securing a search warrant and more with the reasonableness of the search, this Court in subsequent decisions has not ignored as an important factor the facts in each case regarding the amount of time and other circumstances to determine if the police had the opportunity to secure a search warrant. *Terry* v. *Ohio*, 392 U.S. 1.

Harris v. *United States, supra,* brought up some very important points that help distinguish that case from the one at bar. As the Court observed in *Harris,* the petitioner was in exclusive possession of a four-room apartment. The canceled checks and other instrumentalities of the crimes charged in the warrants would not likely be visibly accessible. In addition, the objects sought for and those actually discovered were properly subject to seizure.

The Court in *Harris* stated, "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime.

"Certainly this is not a case of search for or seizure of an individual's private papers. In keeping the draft cards in his custody, petitioner was guilty of a serious and continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search."

In the instant case, we have the police seizing the petitioner's private diary; this diary was not involved in any way regarding the criminal activity charged against the petitioner. If the Fourth Amendment didn't protect the police seizure of something as personal as this at the time in question, then one would honestly wonder what the Fourth Amendment prior to *Chimel* did protect.

Even the *Harris* case didn't give the police unlimited search and seizure power. As the Court stated in *Harris,* "Other situations may arise in which the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive."

The search and seizure of the petitioner's diary in this case would be a clear example of this. The police were searching the petitioner's apartment for knives, guns, hoods, and a camera, those things used to commit the crime and the stolen articles themselves. The seizure of the diary was completely unrelated to the crime, and certainly to maintain a diary is hardly a crime as the draft cards that were seized in *Harris* was.

Additionally, in *Harris,* the police were searching for two canceled checks of an oil company which had been stolen and which were thought to have been used in effecting the forgery. The search for canceled checks neces-

sarily requires a more extensive search, possibly extending into Harris's personal papers. The same need to rummage into personal papers is clearly absent when the object of a search is for such items as knives, and cameras.

The District Attorney was in a real dilemma in this case. This is especially made clear when the District Attorney is attempting to justify the search and seizure of the petitioner's diary to the Court based on the mistaken arrest. On page 33 of the trial transcript the District Attorney, Mr. Herzbrun, states, "They are looking for more. Remember this man has created a problem. They have asked him, 'Who are you?'

" 'I'm Miller and I've got some identification.' Now they have got to determine. . . . they're pretty sure, in fact, they are very sure they have Hill. . . . they are really arresting Hill at that point. . . . "

The problem is readily apparent; if the District Attorney argues that the police proceeded to search and seize the personal papers of the petitioner, including the diary, rent receipts, etc. for the purpose of making sure Miller wasn't Hill, then you weaken the officer's story that he in good faith, was sure he was arresting Hill and not Miller, thereby negating any right of the officers to search at all.

If, on the other hand, the officers are sure that Miller was the petitioner, then there is absolutely no justification for searching and seizing the diary and other personal papers that were completely unconnected with the crime.

The present case would almost certainly be reversed by the majority's thinking in *Harris* on the basis that the petitioner's diary was obtained as a result of an illegal search and seizure in violation of the protections afforded by the Fourth Amendment.

As Justice Frankfurter in the dissenting opinion stated, in quoting Justice Brandeis, "The makers of our Constitution conferred, as against the Government, the right to be left alone, the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

Although the petitioner did not object to the damning evidence of the diary on the basis of the Fifth Amendment, a brief mention might appropriately be made here on this subsidiary issue. The Fifth Amendment, among other things, declares that no person, "shall be compelled in any criminal case, to be a witness against himself." The statements made by the petitioner in his diary involving himself were extremely incriminating and, in fact, were the basis of his conviction.

As the Court declared in *Boyd* v. *United States, supra,* "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other."

The Court in *Gould* v. *United States, supra,* expressed their views towards this issue by stating, "The same papers being involved, the answer to this question must be in the affirmative, for, they having been seized in an unconstitutional search, to permit them to be used in evidence would be in effect, as ruled in the Boyd case, to compel the defendant to become a witness against himself."

Part of the *Gould* decision certainly stands for the proposition that even in a lawful search with a search warrant, the police cannot use this authority to gain access to a private citizen's residence and search and seize private papers solely for the purpose of securing additional evidence to be used against him in a criminal or penal proceeding, "but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken."

The rule of *Mapp* v. *Ohio*, 367 U.S. 643, that exclusion of evidence seized in violation of search and seizure provisions of the Fourth Amendment is required of States by the due process clause of the Fourteenth Amendment, and, therefore, the petitioner respectfully submits that the petitioner's personal diary should not have been admitted into evidence over the objections of the petitioner.

Does the Rule in Chimel v. State of California Apply to Unconstitutional Searches and Seizures Prior to the Date of the Opinion of Chimel?

Inasmuch as the unlawful search and seizure in the instant case took place prior to June 23, 1969 (the date the opinion in *Chimel* was handed down), it is important from a constitutional stand-point to have a Court determination as to whether or not *Chimel* will be treated retroactively or prospectively.

As previously stated in the first issue, the petitioner strongly contends that the diary pages were seized by the police as a result of an unconstitutional search and seizure in violation of his Fourth Amendment rights. The *Chimel* case clearly limiting the power of the police to search, merely emphasizes the unconstitutional seizure in this case and if *Chimel* is given retroactive application, then clearly this would be additional basis to reverse the conviction of the petitioner for the reasons already stated in the discussion of the first issue.

The instant case is another in a whole series of cases dealing with the problem the Courts have had in making a determination of the effective date of criminal decisions relating to constitutional rights. For many years the United States Supreme Court had held that its decisions in this field were retroactive. *Gideon* v. *Wainwright,* 372 U.S. 335, *Hamilton* v. *State of Alabama,* 368 U.S. 52, and, *Douglas* v. *State of California,* 372 U.S. 353.

The California Supreme Court in the *Lopez* case, 62 Cal.2d 368, and the United States Supreme Court in *Linkletter* v. *Walker,* 381 U.S. 610, ruled its decisions were partially prospective by holding that they applied only to pending appeals. Then this Court approached pure prospective operation when it held in *Johnson* v. *State of New Jersey,* 384 U.S. 719, that the rules announced the week before, *Miranda* v. *State of Arizona,* 384 U.S. 436, should apply only to cases tried after the date *Miranda* was decided, although the constitutional evasion took place before *Miranda* was decided.

In the *Johnson* case, the Supreme Court also announced that its rulings in *Escobedo* v. *State of Illinois,* 378 U.S.

478 were prospective in that they applied only to cases tried after *Escobedo* was decided. Then in the *Stovall* case, 388 U.S. 293, the Court held that line-up rules announced in the *Wade* and *Gilbert* cases were to be applied prospectively in that the application of these rules would apply only to cases where the line-up was held after June 12, 1967.

It is the petitioner's contention that the constitutional issues involved in the instant case are more closely aligned to the constitutional guarantees expressed in *Gideon* and should be given retroactive effect.

The Court in *Stovall* declared in effect, that many factors are involved in helping the Court to determine whether a constitutional change in interpretation is to be given retroactive treatment factors such as: (1) The criteria guiding resolution of question of retroactivity of constitutional rule of criminal procedure indicate the purpose to be served by new standards; (2) The extent of reliance by law enforcement authorities on old standards, and (3) The effects on administration of justice of retroactive application of new standards.

Retroactivity or non-retroactivity of rules is not automatically determined by provision of Constitution on which dicta are based, and each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which such factors combine must inevitably vary with the dicta involved. See *Stovall, supra.*

The Fourth Amendment guarantee against unreasonable searches and seizures does not fall in the category of the new rules espoused in *Wade* and *Gilbert*. Subsequently,

Stovall failed to apply to cases on a retroactive basis. The law enforcement authorities across the country were, or should always have been, aware of the protection afforded private citizens in their homes and should have known if they didn't obtain a search warrant in advance, or if they made an unreasonable search incident to a lawful arrest, that there was a great possibility that the evidence obtained in violation of the victim's constitutional rights would be excluded from evidence.

Law enforcement authorities knew how strongly this Court in most instances in the past has interpreted the protections afforded by the Fourth Amendment. The law enforcement authorities also knew when they took great liberties in searching a private citizen's home without prior approval from a magistrate that they were skating on thin ice. The Court's ruling in *Chimel* is no sudden and surprise departure from earlier Court decisions. Many authorities knew the steady encroachments of the protections guaranteed by this Amendment would eventually come to a halt.

Stovall is easily distinguished from the instant case. In *Stovall* the Court relied heavily on the fact that law enforcement authorities of the Federal Government across the country had, prior thereto, proceeded on the premise that the Constitution did not require the presence of counsel at pre-trial confrontations for identification. Furthermore the overwhelming majority of American Courts have always treated the evidence questions as a question of credibility and not one of admissibility.

So in *Stovall* you have a brand new requirement that the law enforcement authorities didn't know was required

or expected. As a result, to treat this new requirement with retroactive effect would have had a serious disruption in the whole judicial process. Many cases would have been overturned on this basis, even though at the time of the line-up, a lawyer was not at the time known to be constitutionally required.

The *Wade* and *Gilbert* rules in effect were aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence; the Court in *Stovall,* quoting the Court in *Johnson* v. *State of New Jersey,* 384 U.S. at 729, stated, "The question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree."

This Court, if it so chose to do, could have reasoned there was only a "matter of degree involved in the defense of Gideon from properly having a lawyer represent him; but this, the Court wisely refrained from so doing." It is the petitioner's contention that such a distinction as contained in *Gideon* is present between the *Wade* and *Gilbert* rules and the issues involved in the case at bar.

The Court in *Linkletter* v. *Walker,* 381 U.S. 622, in determining whether a decision should be retrospectively applied stated they must weigh the merits and demerits of the particular case by looking to prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation, and "this approach is particularly correct with reference to Fourth Amendment prohibitions as to unreasonable searches and seizures."

To give *Chimel* retroactive effect would probably cause very little disruption in the judicial processes across the country nor would it be inconsistent with past high Court decisions to go back years to determine if the defendant's constitutional rights have been violated. When dealing with important constitutional questions, the Court has, on many occasions in the past, ruled out other problems that may occur if they give a rule retroactive effect. Problems caused in large part because of the age of the case such as unavailable witnesses and other relevant evidentiary matter that may be difficult to produce at the re-trial.

In *Fay* v. *Noia,* 372 U.S. 391, Noia was convicted by unconstitutional means twenty-one years before his conviction reached the United States Supreme Court and twenty years elapsed before *Reck* v. *Pate,* 367 U.S. 433, was overturned by this Court.

The Court in *Noia* stated that habeas corpus was designed to go behind final judgments and release people who were held on convictions obtained by reason of a denial of constitutional rights.

As Justice Black stated in the dissent in *Stovall* v. *Denno,* 388 U.S. 300, "To deny this petitioner and others like him the benefit of the new rule deprives them of a constitutional trial and perpetrates a rank discrimination against them.

In the instant case this would, as Justice Black states in the dissenting opinion of *Linkletter* v. *Walker, supra,* "merely open up to collateral review cases of men who were in prison due to convictions where their constitutional rights had been disregarded. Noia rested on the sound principle that people in jail, without regard to when they

were put there, who were convicted by the use of unconstitutional evidence were entitled in a Government dedicated to justice and fairness to be allowed to have a new trial with the safeguards the Constitution provides."

To rule that *Chimel, supra,* is not retroactive is to cut off many defendants who are now in jail from any hope of relief from unconstitutional convictions and denies these same defendants due process and equal protections of the laws that are set forth in the Fourteenth Amendment of the United States Constitution.

For the reasons heretofore stated, the petitioner respectfully requests that the conviction of the petitioner be reversed.

Respectfully submitted,

JOSEPH AMATO
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA,
COUNTY OF ....., *ss.*:

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is:

.....

On 22 Nov., 1969, I served the within Petitioner's opening brief on the State of California in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palos Verdes addressed as follows:

Ronald M. George
Deputy Attorney General
of California
600 State Building, 217 West First St.
Los Angeles, California 90012

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on 22 Nov. 1969 at Palos Verdes, California.

MARILYN GASTON